Supreme Court, U.S.
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No. 98-_____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

MIRTHA URBANO,
Petitioner

v.

CONTINENTAL AIRLINES, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an employer refuses to make the same accommodation for pregnant employees as the employer routinely makes for other temporarily disabled employees, does such a practice violate the plain language of the Pregnancy Discrimination Act ("PDA") requiring that pregnant employees "shall be treated the same" as others solely with reference to their "ability or inability to work"?

2. Can the Fifth Circuit legitimately (i) ignore this Court's mandate from *Johnson Controls* that "the PDA means what it says," (ii) reject the reasoning of the Sixth Circuit, which has applied a literal interpretation of the PDA, and (iii) inject additional language beyond the PDA's intentionally specific comparison between pregnant employees and other employees solely with respect to their "ability or inability to work," in order to uphold a summary judgment in favor of an employer who refused to make the same accommodations for pregnant employees that other temporarily disabled employees received?

3. Is the Sixth Circuit's reasoning more consistent with the PDA and *Johnson Controls* than the Fifth Circuit's opposite reasoning, when an employer creates a benefits-related distinction among workers who have been temporarily disabled by "injury or illness" – allegedly based on the costs associated with whether the medical condition is job related or not job related – even if the application of such a distinction has a disparate impact on pregnant employees and the cost differential is not unduly prohibitive?

4. What is the meaning of *Hicks* in the summary judgment context or, in particular, is summary judgment defeated when evidence on each element of a Title VII prima facie case is combined with evidence supporting the fact-finder's prerogative to disbelieve an employer's explanation for an otherwise discriminatory practice?

5. Does the Fifth Circuit's standard that suspicious timing is not sufficient to support an inference of retaliation for filing a claim with the EEOC (which is inconsistent with seven other circuits, but consistent with two others) unreasonably impair the application of Title VII?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Mirtha Urbano.

The Respondent is Continental Airlines, Inc. Petitioner is not aware of any parent companies or subsidiaries of Continental Airlines, nor has Continental Airlines identified any such affiliated entities in the proceedings below.

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 138 F.3d 204; its text is set forth in the Appendix at pp. 1a - 8a. The opinion of the District Court for the Southern District of Texas (Houston Division) was not designated for publication; its text is set forth in the Appendix at pp. 9a - 18a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on April 15, 1998. The judgment of the district court was entered on November 1, 1996. *See* App'x 18a. This Court has jurisdiction to review on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Appendix of this Petition for Writ of Certiorari at pages 19a through 24a contains the pertinent provisions of the Fourteenth Amendment to the United States Constitution; the Family and Medical Leave Act at 29 U.S.C. §§ 2612(a)(1) and 2615(a, b); the Pregnancy Discrimination Act at 42 U.S.C. § 2000e(k); Title VII of the Civil Rights Act of 1964 at at 42 U.S.C. §§ 2000e-2(a, k, m), 2000e-3(a , b), and 2000e-5(f); and Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

Initial Background Facts

This case arises from allegations that a pregnant employee, Mirtha Urbano, suffered unlawful discrimination at the hands of her employer, Continental Airlines, Inc. ("Continental").

Mirtha Urbano began working for Continental in July of 1990. Ms. Urbano had several different positions with Continental, ultimately obtaining a full-time position as an Airport Sales Agent with bilingual interpreter status. In that capacity, her duties involved assisting customers with the purchase of airline tickets, providing flight information, checking in customers, and checking baggage.

In October of 1994, Ms. Urbano discovered she was pregnant. Ms. Urbano advised her immediate supervisor of her pregnancy, and told him she was experiencing back pain when lifting luggage. In response, the supervisor advised Ms. Urbano to take some time off from work and visit a doctor for an accurate evaluation. The supervisor also told Ms. Urbano that he would arrange for her to be placed in a "light duty" position when she returned to work. At Continental, the term "light duty" (also called "limited duty" or "transitional duty") refers to tasks that have minimal physical strength requirements, and which were routinely given to workers who suffered temporary disabilities through injury or illness. Under normal circumstances, Ms. Urbano's job required her to be able to lift luggage weighing up to 70 pounds.

Ms. Urbano did indeed visit a doctor, who restricted her from lifting anything over 20 pounds for the remainder of her pregnancy. When Ms. Urbano returned to work, she met with the Continental manager responsible for assigning light duty, and presented the doctor's note containing this restriction. The manager denied Ms. Urbano's request for light duty, declaring that Continental simply did not provide the light duty option for pregnant women. If she could not continue to lift 70 pounds while pregnant, Ms. Urbano was advised, then she could not return to

work until the baby was born or the doctor lifted the restriction. Ms. Urbano spoke to another Continental manager the same day, who reiterated Continental's policy – pregnancy was not an acceptable basis for being considered for a light duty transfer.

Over the next few months, Ms. Urbano made requests for assignment to any of three separate areas at Continental, areas which Ms. Urbano chose because she knew that there were no lifting requirements and for which she knew she was qualified – given that she had actually worked in all three areas at Continental prior to becoming an Airport Sales Agent. Ms. Urbano was again told that each request *could not even be considered.* The effect of her situation was therefore made clear: if Ms. Urbano wanted a paying position, her only options were (1) to keep working in the heavy lifting position in contrast to her doctor's orders or (2) to quit, thereby losing all seniority, and reapply like any random person off the street. Recognizing that other temporarily disabled workers at Continental were frequently given a third option – being reassigned to light duty without losing benefits or seniority – Ms. Urbano filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 7, 1995.

It is undisputed that Continental received formal notice from the EEOC of Ms. Urbano's charge on March 20, 1995. It is further undisputed that the very next day, on March 21, 1995, Continental prepared and sent notice to Ms. Urbano that she was being terminated, with a retroactive effective date of February 6, 1995.

Filing Suit

The EEOC proceeded to investigate the charge and, on March 30, 1995, the EEOC sent Ms. Urbano a "right to sue" letter. Having thus exhausted her administrative remedies, Ms. Urbano filed suit in the U.S. District Court for the Southern District of Texas on June 27, 1995. Among the allegations asserted by Ms. Urbano were (1) violations of the Pregnancy Discrimination Act, (2) retaliatory firing for making a charge to the EEOC about such PDA violations, (3) failure to reinstate her job after exercising the

leave authorized by the Family and Medical Leave Act, (4) retaliatory firing for making a charge to the EEOC about such an FMLA violation, and (5) a claim under Texas state law for intentional infliction of emotional distress. The bases of federal jurisdiction included the existence of federal claims (28 U.S.C. §§ 1331), issues of an employer in an industry affecting commerce (28 U.S.C. § 1337; 42 U.S.C. 2000e(b, g, h)), and issues of civil rights (28 U.S.C. § 1343; 42 U.S.C. § 2000e-5(f)(3)). The ancillary jurisdiction of the federal district court over state-law claims was invoked pursuant to 28 U.S.C. § 1367(a), because the state-law claims arose out of the same nucleus of operative facts as the federal claims and were so closely related to the federal claims that they formed part of the same case or controversy.

Faced with this lawsuit, Continental filed an answer on August 29, 1995,[1] including a new defense which had not been asserted to the EEOC nor communicated to Ms. Urbano at any time prior to the filing of the answer: that Continental did not fire Ms. Urbano; instead, the termination was allegedly retracted and she was now considered to be on medical leave of absence. During the discovery process for the lawsuit, Continental officials were forced to concede that there were no documents to support this belated assertion of an "accidental" firing; indeed, it was undisputed that Continental never made any effort to notify Ms. Urbano of the alleged "mistake" and, furthermore, the company claimed to have lost all paperwork indicating that Ms. Urbano's name was on an allegedly pre-existing list of several other people subject to administrative termination – which Continental was retracting anyway, since Continental now wanted to retain Ms. Urbano as an employee on involuntary medical leave.

Summary Judgment Motion

In June of 1996, Continental filed a motion for summary judgment, attacking all of the causes of action asserted by Ms.

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[1] A clerical error necessitated the re-issuance of a summons by the district court on August 9, 1995, thus creating an answer date more than 20 days after the initial filing of the complaint and summons on June 27, 1995. *Cf.* FED. R. CIV. P. 12(a)(1)(A).

Urbano. The essence of Continental's argument was that the PDA's mandate – pregnant employees must be treated no differently than other employees by considering solely the "ability or inability to work" – needed an extra step. Specifically, Continental asked the court to consider the *reason* underlying each employee's "ability or inability to work" and, if the court would do so, the court should thus limit the comparison of pregnant employees to workers whose reasons stemmed from off-the-job injuries or illnesses. Continental explained its twofold rationale for considering the cause underlying an employee's temporary disability as follows: (1) "Continental feels a special obligation to its employees who are injured in the line of duty" and (2) "the costs associated with an employee who has an on-the-job injury."[2] As for the ambiguous reference to "costs," *Continental never submitted any evidence of the amount or nature of such "costs"* beyond the mere conclusory assertion that they existed.

As will be explained later in this Petition, the record before the district court contained significant evidence that Continental's proffered business rationale was merely a pretext, both factually (given the record) and as a matter of law (given this Court's guidance under *International Union v. Johnson Controls*, 499 U.S. 187 (1991)).

District Court Ruling

The district court ruled in favor of Continental on all causes of action, rendering a complete summary judgment. On the issue of whether Continental's policy had an unlawful **disparate impact** on pregnant employees, the court held that if pregnant employees were compared to employees who suffered off-the-job injuries or illnesses, then there was no violation of the PDA's comparison based on an "ability or inability to work." App'x 12a-13a. The court further held that there was no statistical disparity giving rise to an inference of discrimination on a disparate impact theory, reasoning that no inferences could be taken from the evidence of

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[2] Quotations are from an affidavit attached to Continental's Motion for Summary Judgment. The affiant was Julie Strickland, who identified herself as the Director of Worker's Compensation for Continental.

only one worker receiving light duty *without* the prerequisite occupational injury or illness. App'x 13a. The court failed to address the concept that the existence of such a worker suggests something different – the selective application of Continental's allegedly "uniform" policy.

On the issue of whether Continental's policy reflected unlawful **disparate treatment** directed toward pregnant employees, the court again focused on the cause of the temporary disability and held (1) that Ms. Urbano could not be "qualified" for light duty since she did not meet the criterion of having suffered either an on-the-job injury or illness and (2) that Ms. Urbano's treatment was identical to employees who suffered off-the-job injuries or illnesses. App'x 13a. Moreover, the court again brushed aside the fact that there was evidence of at least one worker who received light duty *without* an occupational injury or illness – which would necessarily undermine Continental's protestations of a "uniform" policy.

On the issue of whether Ms. Urbano's termination was **retaliation** for filing an EEOC charge, the court cited Fifth Circuit precedent for the notion that mere timing – even under the circumstances of a one-day turnaround – is insufficient to give rise to an inference of retaliation. App'x 14a (citing *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995)). The district court added its acceptance that the termination notice was an error that was corrected, such that there was no genuine issue of retaliatory firing. App'x 14a-15a.

On the issue of Ms. Urbano's claim of **failure to reinstate under the Family Medical Leave Act ("FMLA")**, the court noted simply that Ms. Urbano was given the required 12 weeks of leave required by the FMLA and, when the leave expired in February, Ms. Urbano was still under medical restrictions and therefore unable to resume her normal duties. App'x 15a. On the issue of **retaliation under the FMLA** for filing the EEOC charge, the court again disregarded the issue of timing and, further, found no significance to the allegation that Ms. Urbano was terminated while on leave. App'x 16a.

Finally, as for Ms. Urbano's **state-law claim of intentional infliction of emotional distress**, the district court stated that its interpretation of Texas law indicated no right to such a recovery for "an ordinary employment dispute." App'x 16a-17a. And, without entertaining live testimony from Ms. Urbano or any witnesses, the court concluded that any distress Ms. Urbano may have suffered was "not severe as a matter of law." App'x 17a. The summary judgment was thereby complete.

Court of Appeals Ruling

On April 15, 1998, the Fifth Circuit panel entered its opinion and judgment, affirming the district court's ruling in all respects. The court of appeals spent the bulk of its opinion addressing the issue of disparate treatment. On that topic, the court of appeals accepted the notion that pregnant employees should be compared to workers with off-the-job injuries. App'x 4a. Thus, given that there was no different treatment between these two categories of temporarily disabled employees, the Fifth Circuit held that there was no violation of the PDA. The Fifth Circuit spent a significant portion of its opinion attacking the reasoning of a Sixth Circuit holding which was based on substantially similar facts, but where the Sixth Circuit held in *favor* of the pregnant employee. *See* App'x 5a-7a (discussing *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996)). In its most direct attack, the Fifth Circuit opined that "the rule advocated by . . . the Sixth Circuit *effectuates discrimination* contrary to the PDA . . . ." App'x 6a (emphasis added).

As for the issues of disparate impact and retaliation, the court of appeals incorporated the district court's analysis, stating simply, "We have reviewed the briefs and the pertinent portions of the record and find no reversible error. . . . [W]e affirm on these issues for essentially the reasons relied upon by the district court." App'x 2a n.1.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW UNDERMINES THE PLAIN LANGUAGE OF THE PREGNANCY DISCRIMINATION ACT.

The plain language of the Pregnancy Discrimination Act ("PDA") indicates that the relevant comparison for a reviewing court is to contrast a pregnant employee with other employees with respect to the pregnant employee's "ability or inability to work" – period. The Fifth Circuit and the district court entered judgments below that are justified only when they add conditional language not included by Congress. In this instance, the lower courts accepted the employer's decision to distinguish job benefits among temporarily disabled workers (including pregnant women), i.e., conditioning the higher-level benefits on whether the "inability to work" was job related – a condition, of course, that pregnancy would never satisfy. Yet, such judicially contrived conditions eviscerate not only the policies underlying the Act, but also eviscerate the previous pronouncements by this Court and the pronouncements of other Circuits that have interpreted this same language.

A. Background of the PDA

At the outset, it is important to recognize the scenario that gave rise to the enactment of the Pregnancy Discrimination Act in 1978. The PDA constituted Congress's direct response to this Court's holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *See California Fed. Sav. And Loan Ass'n v. Guerra*, 479 U.S. 272, 284-89 (1987) (explaining legislative history of the PDA). In *Gilbert*, this Court held that differential treatment based on pregnancy was not a gender-based classification and, therefore, pregnancy discrimination did not constitute a violation of Title VII of the Civil Rights Act of 1964. Congress responded to *Gilbert* by modifying Title VII to include language specifically addressing the issue of pregnancy.

Specifically, Congress made a single change to the definitional portion of Title VII, so that it would contain the following statement:

> . . . The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women affected by pregnancy*, childbirth, *or related medical conditions shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work*, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

42 U.S.C. § 2000e(k) (emphasis added). Thus, Congress left no room for doubt that pregnancy and related medical conditions would be treated as gender characteristics, such that employment practices directed toward pregnancy-related conditions would be subject to the same scrutiny and potential penalties as any other practices commonly understood to constitute sex discrimination.

B. Significance of the "ability or inability to work" standard

Clearly, Continental's primary accomplishment was in convincing the lower courts that the language of the PDA was not good enough; that there was some benign effect in further sub-categorization of its workers. Yet, the very *purpose* of the PDA was to protect a particular class of workers (pregnant women) who were routinely harmed by such a practice, and provide a remedy for them. *See Guerra*, 479 U.S. at 285-86. With the enactment of the PDA, Congress mandated that the employer would be forced to disregard the reason for a pregnant employee's ability or inability to work.

Continental's policy of ascertaining whether an "injury or illness" was job-related *vel non* also misses an essential point – *pregnancy is neither an injury nor an illness*. Because pregnancy did not fit Continental's default categories, Continental still needed to reach some conclusion as to where to place pregnancy –

a unique form of temporary disability – among the range of temporary disability benefits available. Continental's decision to relegate pregnant women to the bottom contravenes this Court's holding in *Guerra*.

In *Guerra*, this Court adopted the position of the lower court it was reviewing:

> We agree with the Court of Appeals' conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise."

Guerra, 479 U.S. at 285 (quoting underlying opinion of Ninth Circuit Court of Appeals, 758 F.2d at 396). Applying this principle to the current scenario, it is clear that pregnant employees must be afforded equal benefits with the best class of workers with which they are equal based on their "ability or inability to work." In other words, it does not offend Title VII for pregnant women to be treated equally with the highest category of workers and, therefore, better than *some* employees – as long as pregnant women are not treated better than *all* employees.

Ms. Urbano was deprived of this right under the PDA by the views of the Fifth Circuit and the Southern District of Texas. In adopting Continental's argument that mere "ability or inability to work" was language that should be further modified, the lower courts went impermissibly astray. Further guidance is provided in *International Union v. Johnson Controls*, 499 U.S. 187 (1991), where this Court quoted from relevant portions of Congressional reports underlying the PDA:

> "Under this bill, the treatment of pregnant women . . . must focus not on their condition alone but on the actual effects of that condition on their ability to work. . . . [U]nder this bill, employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue."

Id. at 205 (quoting from *Amending Title VII, Civil Rights Act of 1964*, S. REP. NO. 95-331 at 4-6 (1977)). This Court described its

own conclusion as follows: "We do no more than hold that the PDA means what it says." *Johnson Controls*, 499 U.S. at 211.

It is clear that the rulings in both of the lower courts would have been exactly opposite if the proper statutory interpretation had been applied to Ms. Urbano's situation. This Court should not countenance the injustice done to Ms. Urbano through the lower courts' modification of this vital federal statute and misinterpretation of this Court's previous holdings on it.

II. THE FIFTH CIRCUIT EXPRESSLY CHALLENGED THE REASONING OF THE SIXTH CIRCUIT IN ITS CONTRARY INTERPRETATION OF THE PDA, AND HIGHLIGHTS A DRASTIC SPLIT AMONG THE FEDERAL CIRCUIT COURTS THAT THIS COURT SHOULD RESOLVE.

In the April 15th Opinion, the Fifth Circuit directly challenged the Sixth Circuit. Specifically, the Fifth Circuit panel accused the Sixth Circuit of outright constitutional violence: "[T]he rule advocated by . . . the Sixth Circuit *effectuates discrimination* contrary to the PDA . . . ." App'x at 6a (emphasis added).

The spark for such fiery language was the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). The *Ensley-Gaines* case involved a policy by the United States Postal Service which differentiated benefits among temporarily disabled workers. The plaintiff was postal employee Kim Ensley-Gaines, who became pregnant and requested an accommodation to her work duties – like Ms. Urbano. The postal service – like Continental -- had a policy of providing better accommodations to employees with work-related injuries. After the plaintiff requested and was denied her request for "limited duty" status, she instituted the proper grievance process of filing a claim with the Equal Employment Opportunity Commission ("EEOC"), which did not find sufficient evidence of discrimination. *Id.* at 1221. Ms. Ensley-Gaines then filed a lawsuit.

Upon completion of the discovery process, the postmaster filed a motion for summary judgment which was granted by the district court. The Sixth Circuit reversed the summary judgment, holding that a genuine issue of material fact existed. Specifically, the Sixth Circuit held that the plaintiff sufficiently demonstrated a prima facie case of discrimination by showing that she was similarly situated to workers who received more favorable benefits. *Id.* at 1226. That is, Ms. Ensley-Gaines was deemed "similarly situated" with workers suffering on-the-job injuries because they were all equal in terms of their "ability or inability to work." *Id.*

Such a holding, which properly limits itself to the plain language of the PDA, is in direct contrast to the Fifth Circuit's adoption of additional, conditional language. The essence of Ms. Urbano's allegations of discriminatory disparate treatment and disparate impact rest on the assumption that she is "similarly situated" with workers who suffered on-the-job injuries or illnesses. The remaining aspects of her prima facie burden are otherwise indisputable: that Ms. Urbano was a member of a protected class (pregnant women), that she could perform the light duty tasks that she requested, and that she suffered an adverse employment decision by not being granted the request for "light duty." *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The opposite holdings on this issue of what it means to be "similarly situated" under the PDA cannot be reconciled. It is the responsibility of this Court to resolve such conflicts.

Beyond the ultimate ruling against Ms. Urbano, part of what makes the Fifth Circuit's holding so troublesome is that it includes a number of "cheap shots" directed at the Sixth Circuit. For example (in addition to the aforementioned charge that the Sixth Circuit "effectuates discrimination"), the Fifth Circuit ridiculed the Sixth Circuit for not "citing any of the opposing circuit court decisions" – even though the Sixth Circuit's decision was firmly grounded in the language of the PDA and the language of this Court in *Johnson Controls* and *Guerra*. *Compare* App'x 7a *with*

Ensley-Gaines, 100 F.3d at 1226. Moreover, the Fifth Circuit characterized the *Ensley-Gaines* opinion as "unpersuasively" distinguishing another Sixth Circuit decision that involved a pregnant postal worker, even though that case involved facts that arose *before* the enactment of the PDA. *Compare* App'x 7a *with Ensley-Gaines*, 100 F.3d at 1225-26.

It is well established that this Court's review on certiorari is appropriate when there is a split among the decisions of two or more of the circuit courts of appeals on the same important issue. *See, e.g., Johnson Controls*, 499 U.S. at 196. The existence of such a conflict between the Fifth and Sixth Circuits could not be any clearer, nor there could there be any clearer statement of such need than the confrontational rhetoric within the Fifth Circuit's opinion. Ms. Urbano should not be left to shoulder the burden of an adverse ruling on her livelihood, based on the mere happenstance of living in the geographical jurisdiction of the Fifth Circuit rather than the Sixth Circuit.

III. THE FIFTH CIRCUIT'S HOLDING IS DIRECTLY CONTRARY TO *JOHNSON CONTROLS*, GIVEN THAT THE EMPLOYER'S SOLE EXPLANATION FOR ITS DISCRIMINATORY PRACTICE IS COST-BASED.

In *International Union v. Johnson Controls*, this Court addressed an employer's exclusion of fertile women from jobs where such women might be exposed to airborne contaminants. 499 U.S. 187 (1991). The employer offered two reasons for this policy: (1) a concern for the safety of the unborn fetuses and (2) additional costs that might arise from health care or health-related lawsuits. This Court rejected both of those reasons as having no validity under the PDA.

The Court interpreted the PDA as leaving issues of fetal safety up to the mother, noting that "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination . . . ." *Id.* at 200. As for cost concerns, one of the more significant aspects of *Johnson Controls*

was the conclusion that "[t]he extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender." *Id.* at 210.

Both of these conclusions are directly applicable to Ms. Urbano's allegations against Continental, and the lower courts' rulings against her on such issues. As noted in the Statement of the Case earlier in this Petition, one of the reasons offered by Continental for its "light duty" policy was that "Continental feels a special obligation to its employees who are injured in the line of duty." *Supra*, p. 5. Yet, this expression of concern, however well-intentioned, is clearly an irrelevant and invalid justification under the PDA; indeed, neither of the courts below bothered mentioning it.

On the topic of Continental's assertion regarding costs, it is worth noting again that there was no evidence before the lower courts of the amount or nature of such "costs," beyond the mere conclusory assertion that they existed. Thus, in addition to negating the concept that an on-the-job injury was some sort of bona fide occupational qualification ("BFOQ"), such a lack of evidence has added relevance: it suggests that Continental's reasons are offered as a pretext for a discriminatory motive. As will be discussed in the next section of this Petition, such evidence of pretext should have operated to prevent summary judgment in the district court, and prevented the judgment's affirmance in the court of appeals.

Returning to the discussion of *Johnson Controls*, this Court stopped short of attempting to address the situation where costs would be so prohibitive as to threaten the survival of a particular business. Of course, that issue is not implicated here anyway, because Continental never offered any evidence of exactly what its costs were, and there is no reason to assume that affording the "light duty" option to pregnant employees such as Ms. Urbano would be "inordinately expensive" for Continental. *Cf. Johnson Controls*, 499 U.S. at 224 (Scalia, J., dissenting)

In sum, Continental failed to offer any legitimate, nondiscriminatory business reason for its policy of denying workers "light duty" on the basis of pregnancy. Insofar as the lower courts' judgments were necessarily predicated on a presumption that is untenable under *Johnson Controls*, such judgments require correction by this Court.

IV. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE *HICKS* STANDARD AS APPLIED TO SUMMARY JUDGMENT PROCEEDINGS.

A. The *Hicks* standard

In 1993, faced with "divergent views" among the circuit courts, Justice Scalia authored an opinion from this Court attempting to clarify the procedural posture and presumptions that apply in a Title VII case. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 512 (1993). As this Court enunciated in *Hicks*, a typical Title VII suit must go through a three-tiered process:

(1) the plaintiff must establish a prima facie case of discrimination under the established McDonnell Douglas criteria;
(2) the defendant then has the burden of producing evidence of a "legitimate, nondiscriminatory reason" for the adverse employment action of which the plaintiff complains; and
(3) the plaintiff must then bring forth evidence of pretext, i.e., evidence indicating that the employer's proffered explanation should not be believed and in fact represents and attempt to conceal a discriminatory motive.

Id. at 506-07. The significant aspect of *Hicks* is its holding that evidence of pretext does not give the plaintiff an automatic win; the finder of fact must still be persuaded that the "dishonest" employer was motivated by unlawful discrimination in pursuing the course of conduct giving rise to the plaintiff's claim.

B. *Hicks* as applied to summary judgments

Because *Hicks* was the result of an appeal of a bench trial, there was no explicit discussion of how its holdings would apply in the summary judgment context. Nevertheless, the discussion within *Hicks* regarding inferences and presumptions is easily applicable.

Again, the primary issue in *Hicks* was to determine what result is permitted or required if the finder of fact does not accept, or chooses to disbelieve, an employer's explanation of the employment decision of which the plaintiff complains. In resolving this issue, *Hicks* answered that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." Id. at 511. This explanation of a permissible inference thus provides a clear answer for the summary judgment context: evidence sufficient to allow the factfinder to disbelieve the employer is also sufficient to allow an inference of intentional discrimination – even though such an inference is not automatic or required.

Unfortunately, this answer was not so clear to the Fifth Circuit and the district court below. That is, despite evidence in the record indicating possible untruth in Continental's explanation of its actions regarding Ms. Urbano, the Fifth Circuit cursorily remarked that there was "no probative evidence" of pretext, without any analysis. To the contrary, the record indicated the following information:

(1) Continental never offered any information to indicate what "costs" it faced by offering light duty to pregnant employees;
(2) Continental claimed to have lost all documentation that would show whether Ms. Urbano was part of a list of employees who were "administratively" terminated;
(3) Continental never contacted Ms. Urbano to tell her that her termination was a "mistake," if indeed it was an error; and

(4) there was evidence that light duty had been provided to at least one employee without a demonstration that her injury was job related and, therefore, supporting the notion that the light-duty policy was not uniform at all.

Based on the lack of supporting facts for Continental's explanations, and the existence of some affirmative facts disputed the explanation, it cannot be said that no reasonable juror might infer disbelief of Continental and its motives. The Fifth Circuit thus denied Ms. Urbano her right to a jury trial that the principles of Hicks required on the state of this particular record.

C. Split among the Circuits

Without any guidance specifically addressing the Hicks rule in the context of summary judgment, the circuit courts have produced differing results. *See Developments in the Law – Employment Discrimination*, HARVARD L. REV. 1568, 1597-1601(1996). For instance, the Seventh and Ninth Circuits have accepted Hicks for its clear rule, and precluded Title VII summary judgment as long as there is evidence that would allow the factfinder to disbelieve an employer's explanation of its employment decision. *See, e.g., Collier v. Budd Co.*, 66 F.3d 886, 892 (7th Cir. 1995); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993).

On the other hand, the Fifth Circuit has written specifically on this topic in another case, holding that mere evidence giving rise to disbelief is not enough for an inference of discrimination – there must be distinct evidence of specific discriminatory intent. *See Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955 (5th Cir. 1993). It is apparently this rule that the court utilized to Ms. Urbano's detriment.

This Court should resolve the split among the circuits on this issue. The inconsistency among the lower courts that gave rise to this Court's grant of certiorari for *Hicks* is appearing again on the issue of Title VII summary judgments. Indeed, this topic has importance that independently justifies a grant of certiorari. It is incumbent upon this Court to correct the erroneous application of

Hicks to Ms. Urbano's situation, and at the same time clarify the proper standard for the lower courts.

V. THE FIFTH CIRCUIT'S JUDGMENT REFLECTS A STANDARD FOR "SUSPICIOUS TIMING" THAT SERIOUSLY UNDERMINES RETALIATION CLAIMS, AND THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE FEDERAL CIRCUIT COURTS.

This is one area where the Fifth Circuit did not include information regarding this in its April 15th opinion, choosing instead to simply affirm the district court's judgment without further comment – essentially merging the two judgments into one. Yet, the district court's judgment relies on the proposition that the close timing, or "suspicious timing" of an employee's EEOC charge and subsequent termination, *ipso facto*, is not sufficient to create an inference of retaliation.

In reaching that conclusion, the district court cited *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995), as an example of the controlling Fifth Circuit standard. App'x 14a. Yet, the *Mayberry* case involved a situation where the party alleging retaliation had made the charge several *years* before the allegedly retaliatory act. Intuitively, such a situation bears a substantive difference from Ms. Urbano's, where Continental took steps to terminate her *the day after* Continental received notice of her EEOC claim.

A. "Suspicious timing" can be the most crucial issue in a retaliation claim

This Court and others have recognized that intent is often difficult to establish in the Title VII context. *See, e.g., United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.") Thus, it is accepted that circumstantial evidence will, sometimes be all that a plaintiff has

to offer. In that context, without a Perry-Mason-like confession from an employer, the close timing of a plaintiff's complaint vis-a-vis a subsequent adverse employment action is the next best thing. The district court's explanation of the Fifth Circuit rule that close timing is *never* sufficient provides a great blow to the adequate enforcement of Title VII.

B. An extensive split among the Circuits – but a matter of first impression in this Court

Unfortunately, this Court has never addressed this important topic, making it one of first impression here. This is surprising, given the wide disparity in the circuit court rulings over the last decade. Among the courts that have held suspicious timing to be sufficient for raising an inference of retaliation are the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals. *Fennell v. First Step Designs, Lts.*, 83 F.3d 526, 535-36 (1st Cir. 1996); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Jalil v. Avdel Corp.* , 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 725 (1990); *Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997); *Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 939 (7th Cir. 1996); *Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 456 (8th Cir. 1995); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731(9th Cir. 1986); *Love v. Re/Max*, 738 F.2d 383, 386 (10th Cir. 1984). Among the courts that have held the opposite view are the Third, Fifth, and Sixth Circuits. *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d. Cir. 1991) (poorly distinguishing *Jalil*); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995); *Cooper v. City of North Olmstead*, 795 F.2d 1265, 1272 (6th Cir. 1986). As is apparent from that overview, the Third and Fifth Circuits have splits amongst themselves.

This Court should take this opportunity to resolve these conflicting opinions. Ms. Urbano would directly benefit from the correct application of the better-reasoned, majority rule.

CONCLUSION

Reviewing the lower courts' opinions it is very apparent, from their cursory handling of the facts and light legal analysis of the many significant legal issues raised by Ms. Urbano's claim, that the district court and the Fifth Circuit took a result-oriented approach to this case. A more careful review of the underlying facts and applicable law, including the precedents set by this Court, leads to but one conclusion – the lower courts' judgments are inconsistent with better-reasoned interpretations of the law.

In addition to correcting the injustice done to Ms. Urbano by the lower courts' rulings, acceptance of this case on certiorari would allow for much-needed clarification in the federal courts regarding several important and specific areas of the Pregnancy Discrimination Act, Title VII, and discrimination-based lawsuits in general. This Court should not allow the current deviations among the lower federal courts to grow even further; continued non-intervention will do a disservice to the Constitution and the equal application of civil rights laws to the citizens of the United States. This Petition has identified many areas where the Fifth Circuit has virtually demanded Supreme Court review, and Ms. Urbano hereby requests that this Court grant her request for a Writ of Certiorari.

Respectfully submitted,

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